

Comments on January 13, 2013 Zoning Administrator Agenda Items

Comments by: Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, NB 92660 (949-548-6229)

Item B: Minutes of November 28, 2012

- Bottom of page 1: “**Zoning Administrator** Wisneski closed the public hearing.”

Item C. Minutes of December 12, 2012

Page 1:

- “Furthermore he added the trash enclosure condition of approval covers both new trash enclosures and existing trash enclosures to ensure trash is disposed of and stored properly.”

This does not match my recollection of what was said at the meeting. Condition 17 requires a three walls plus self-latching gate trash enclosure with decorative solid roof in which the dumpsters would be stored. This definitely does not describe the existing enclosure: two walls plus non-self-latching gate with no roof of any kind. The public was told that Condition 17 *would not* be applied to the existing structure, but it *would* be enforced if the structure was ever rebuilt.

- “Mr. Alford read into the record revised facts in support of findings for the resolution and approved the item as **submitted-amended**.” (or “**revised**”)

Page 2:

- “The Acting Zoning Administrator asked the applicant if they had any questions regarding the findings and conditions in the draft resolution.”
 - It would seem appropriate to include in the minutes what the response was.

Item 1. Hershey’s Market Minor Use Permit (PA2012-125)

Comments regarding the draft resolution:

SECTION 1. STATEMENT OF FACTS.

- Statement 2. “The applicant **proposes** accessory food service use within the existing grocery store and delicatessen, which will include six (6) tables and 12 chairs.”

I believe the tables and chairs may be an existing use, in which case it would seem more accurate to say: ““The applicant **seeks approval for...**”

The Applicant's Project Description (attachment ZA 3) suggests there are already two tables. It is unclear from that document, and from this, if the proposal is to add four tables for a total of six, or to add six for a total of eight.

SECTION 3. REQUIRED FINDINGS.

- Page 3, Fact 1:

*"The proposed project is located within a **nonresidential** zoning district with residential uses nearby."*

The statement that the district is nonresidential seems contradicted by Fact 1 on page 2, which says the General Plan designation for the area is intended to *"provide for commercial development near the bay while integrating **residential** development on the upper floors."*

*"The operational characteristics are that of retail sales establishment, and **not of a restaurant, bar, or nightclub.**"*

Is a *Subway* or *MacDonald's*, where one buys food and sits at tables to eat it, regarded as a "restaurant"? I would think so, and the proposed operation here seems to me to have very similar characteristics to those.

- Page 3, Fact 4. *"On-sale alcoholic beverage service is not proposed."*

Does the market sell alcohol as part of its retail sales operation? If so, does this mean customers will be prohibited from consuming alcohol at the tables?

The Applicant's Project Description (attachment ZA 3) says that 20% of sales are alcohol; and I see nothing in the conditions of approval prohibiting its consumption at the tables. It is possible the applicant's current liquor license prohibits that, but they could presumably apply for a different kind of license, making that use possible, unless explicitly prohibited in this MUP. It also seems possible the Market is regarded as a "alcohol sales establishment," in which case consumption on premises would seem to be prohibited by NBMC 20.48.030.A.1.

CONDITIONS OF APPROVAL

*"7. The project may necessitate **additional plumbing fixtures** as required by the Building Division."*

Does this refer to bathroom facilities? Does the market currently provide them? And are they normally required for a dining use?

*"8. The **addition** of the tables and chairs shall be reviewed and approved by the Fire Department and the door and exiting requirements may change based on the occupant load."*

Are these tables and chairs really being added? Or do some of them already exist?
The implication that there may be an increased occupant load seems to contradict earlier assertions that there will be no traffic impact.

"16. The applicant shall ensure that the trash dumpsters and/or receptacles are maintained to control odors."

I believe Dan Purcell may have observed problems with refuse storage at this location.

*"17. Storage outside of the building in the front or at the rear of the property shall be prohibited, with the exception of **the required trash container enclosure**."*

The nature of the "required trash container enclosure" does not seem to be defined in this document.

"19. A Special Event Permit is required for any event ... that would ... involve the sale of alcoholic beverages ..."

Fact 4 on page 3 implied there would be no on-sale alcoholic beverage service.

"21. To the fullest extent permitted by law, applicant shall indemnify, defend and hold harmless City ..."

As has been pointed out to me by a prominent local attorney, the Newport Beach City Attorney has publicly asserted (for example with respect to the proposed Uptown Newport Airport Land Use Commission override) that the City has **no** liability for land use decisions. If so, why are we asking the applicant to indemnify the City?

Item 2. Island Cinema - Amendment 1 to UP2011-029 (PA2012-144)

Comments regarding the draft resolution:

SECTION 4. DECISION.

"1. The Zoning Administrator of the City of Newport Beach hereby approves Amendment 1 to Minor Use Permit No. UP~~2004~~2011-029, ..."

"3. This Resolution supersedes Zoning Administrator Action Letter dated November 9, 2011, for the approval of Minor Use Permit No. UP2011-029 (PA2011-170), which upon vesting of the rights authorized by this application, shall become null and void."

If the previous Action Letter is to become null and void, it would have seemed useful to include a copy in the staff report so that it can be verified the Conditions of Approval are being carried forward.

CONDITIONS OF APPROVAL

"19. Patrons shall be required to show valid identification to verify age at the point of sale for alcohol."

The Applicant's Project Description (Attachment ZA 3) suggests a wrist-band system is currently used to identify 21-and-over patrons, but the permit does not seem to be any condition requiring that.

"21. Alcoholic beverages shall be dispensed, sold, and served in containers that are easily distinguishable from non-alcoholic beverage containers."

This protection seems easily evaded by pouring drinks from one container to another.

"23. No more than two (2) alcoholic beverages shall be sold or served to any one (1) person during a single transaction. The delivery of alcoholic beverages to patrons inside the auditoriums shall be limited to two (2) per patron per screening."

There seems to be a disconnect between the applicant's desire and the understanding of the Police Department's intent as described on page 2 of the staff report:

- *"The Police Department recommended that no more than two alcoholic beverages be served to any one person during a movie screening and that a person could purchase two alcoholic beverages per transaction at the concession area."*
- *"the applicant would like to clarify that the condition does not limit each person to two drink purchases per movie."*

If the Police intend to limit consumption to two drinks per person per screening, then it sounds like they chose the word "delivery" to mean delivery by self-service **or** by a paid server; yet the applicant appears to read this as meaning self-service doesn't count as delivery of a drink to a patron in an auditorium. I read the Police-suggested conditions to mean that a patron can order two drinks at a time by either means (either for themselves or themselves and a legal-age companion), but each can consume at most two in the theater during a movie. There seems to be no limit only on the number consumed in the concession areas; seemingly leaving open the possibility they will indeed serve as after-the-movie bars.

"25. During the period of time from the initiation of seating until the completion of the feature presentation, ambient lighting in the auditoriums shall remain at a level sufficient enough to allow a reasonable person to observe patrons who may be consuming alcoholic beverages."

Is this realistic? And why not say "At **all times** ambient lighting in the auditoriums shall remain..."? If not, at what times is a lesser lighting level allowed?

"28. The ~~petitioner~~ permittee shall post and maintain..."

"30. The ~~petitioner~~ permittee shall not share any ..."

"38. To the fullest extent permitted by law, applicant shall indemnify, defend and hold harmless City ..."

Same comment as for indemnity clause in previous agenda item.

Additional comments:

- I do not agree with the removal of the condition that alcohol sales be permitted only in connection with 21-and-over screenings; and it seems inconsistent with the Planning Commission's recent decision regarding the Port Theater, in which, under very similar circumstances, if I remember correctly alcohol sales were restricted to areas in which access was restricted to those 21 and older.

- It is unclear to me why Planning Division staff has rejected some of the conditions recommended by the Police Department (Attachment ZA 4), particularly that alcohol sales in the auditoriums be limited to patrons seated in designated areas. That said, it is also unclear to me if that was the system used in the theaters studied by the Police Department, or if the seating in such areas is limited to 21 and over patrons.
 - Other reasonable sounded recommended constraints, such as a prohibition on “happy hour” type of reduced price alcoholic beverage promotion,” have also been omitted.
 - I understand that an additional Operator’s License will be required, but I think the public deserves some explanation of why specific recommendations of its Police Department have been ignored; especially since the Operator’s License is primarily concerned with late night operations, and alcohol service will be occurring starting the theater’s opening at 11 am.
- Likewise, it appears the applicant makes a number of statements in Attachment ZA 3 that it promises will ensure a safe and orderly operation, yet the proposed Conditions of Approval do not appear to require they adhere to most of them, including some that are part of the present operation (for example, use of wrist bands to identify age-cleared patrons).

Item 3. Ink Yard Tattoo Studio Minor Use Permit (PA2012-159)

Comments regarding the draft resolution:

SECTION 1. STATEMENT OF FACTS.

“1. ... property located at 2233 West Balboa Boulevard, Suite 106, and legally described as Lot 9, 10, 11, 12, 13, 14 and 15, in Block 22 ...”

It seems improbable to me that a single 890-square-foot suite would span 7 lots.

SECTION 3. REQUIRED FINDINGS.

Fact B.3. *“Pursuant to Section 20.38.060 (Nonconforming Parking), a nonconforming use in a nonresidential zoning district may be changed to a new use allowed in that zoning district without providing additional parking, provided no intensification or enlargement...”*

The report fails to identify what the use was at the time the property became legally nonconforming. It is probably had a similar parking requirement, but I believe the intent of the code is to keep the parking needs at that level or less, whatever it was. Otherwise new parking needs to be provided.

Fact C.2. *“The proposed hours of operation will be 11:00 a.m. to 10:00 p.m., 7 days per week.”*

This statement, consistent with the applicant’s request, is inconsistent with Condition of Approval 2: *“The hours of operation for the tattoo studio shall be 10:00 a.m. to 11:00 p.m., Monday through Saturday, and 10:00 a.m. to 10:00 p.m. on Sunday.”*